

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JUNE B. GREINER,

Plaintiff,

v.

CAMERON WALL, et al.,

Defendant.

CASE NO. 3:14-cv-05579-RBL

ORDER DENYING DEFENDANTS'
MOTION TO APPLY LAW OF THE
CASE DOCTRINE AND MANDATE
RULE

I. INTRODUCTION

THIS MATTER is before the Court on Defendants' Motion to Apply Law of the Case Doctrine and Mandate Rule. Dkt # 146. This case involves the execution of a search warrant by special agents from the United States Department of Homeland Security and the Internal Revenue Service.

The DHS and IRS believed Plaintiff June Greiner unknowingly bought her home on behalf of a suspected money launderer, Jason Hagen. The agents obtained and executed a search warrant at Greiner's home to search for evidence of Hagen's money laundering. The agents claim they knocked on Greiner's door and announced their presence and that Greiner refused to let them in. They used a "ram" to open the door and execute the warrant.

1 Greiner sued, claiming the agents did not “knock and announce” before forcing their way
2 into her home, in violation of her Fourth Amendment rights (and in violation of the federal
3 “knock and announce” statute).

4 The individual Defendants moved for summary judgment. They argued that Greiner’s
5 claim that she did not hear the knock and announce is not enough to survive summary judgment
6 in the face of “overwhelming” evidence that they did knock and announce—including her
7 admission that she heard “something,” including “voices” and a “loud bang.” Greiner claimed
8 that she did not hear anything resembling a knock and announce; instead, she heard one loud
9 crash followed by the sound of men murmuring at her door. She checked her entryway, saw a
10 group of men huddled around her door, turned, and retreated to call 9-1-1.

11 The Court granted the individual Defendants’ Motion for Summary Judgment on
12 Greiner’s Fourth Amendment claim. Dkt # 119. The Court held that Greiner’s evidence did not
13 establish a factual issue as to whether the agents knocked and announced.

14 Greiner appealed. During oral arguments, Greiner’s counsel arguably conceded to the
15 Ninth Circuit that “the knock was there” prior to the Defendants entering Greiner’s home:

16 **Mr. Anderson:** [T]he issue is was there a sufficient knock and announce. Bam.
17 Bam. Bam. Police. Warrant. Open the door. You have to have both And if I
don’t convince you, I, *the knock was there*. She somehow got to the door

18 **Question:** But you just said they met the knock and *I’m trying to see if you agree*
that what occurred here was the knock.

19 **Mr. Anderson:** *I don’t think they properly knocked*, but that’s an inference. I
think that *they did something to cause her to go to the front door that satisfies*
20 *it* What they did though, is they never clearly announced

21 Dkt # 149 at 4–5 (emphasis added). The Ninth Circuit briefly addressed the knock in a footnote
22 when they stated that the Plaintiff’s counsel “conceded” that the knock did occur, and the court
23 would focus instead on the Defendants’ announcement:
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1 [A]t oral argument, Greiner's counsel conceded that "the knock was there," and
2 agreed that the Agents "did something that caused [Greiner] to go to the front
3 door." Based on that concession we are satisfied that a "knock" occurred, and
focus our attention instead to the related question of whether the officers
announced their purpose and authority before forcibly entering the house.

4 Dkt # 139 at 3 n. 1 (emphasis added). The Ninth Circuit held that Greiner had "demonstrated a
5 triable issue of material fact concerning whether the Agents complied with the knock and
6 announce statute." It vacated this Court's Order and remanded the case for further proceedings.
7 Dkt # 139 at 5.

8 Defendants now argue that the Ninth Circuit conclusively determined that Defendants
9 satisfied the "knock" element of the "knock and announce" statute. They argue that this Court
10 must accept the Ninth Circuit's "factual finding" based on the law of the case doctrine and the
11 mandate rule. Defendants contend that the "only question remaining for trial, pertaining to
12 liability, is whether Defendants satisfied the 'announce' portion of the Fourth Amendment and
13 the Knock and Announce statute."¹ Dkt # 146 at 2.

14 Greiner argues that the law of the case doctrine does not apply because the Ninth Circuit
15 did not make a finding of fact that the Defendants satisfied the knock element of the "knock and
16 announce" statute. She contends that the Ninth Circuit based its decision on the announcement
17 element of the statute and the brief consideration given to the knock element was not necessary
18 or essential to its holding.² Greiner argues that the Ninth Circuit's brief discussion of the knock
19 element is not the law of the case and is not binding on this Court.

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21 ¹ Defendants backup argument is that Plaintiff's counsel's statement during oral arguments that "the knock was
22 there" is a binding judicial admission. The Defendants raised this argument in their reply brief and the Plaintiff did
not have an opportunity to respond. The Court will not address this argument at this time. If the Defendants insist on
pursuing this, they can re-raise the issue of judicial admissions in their motions in limine.

23 ² Greiner argues that the Ninth Circuit's assumption that there was a knock, in a footnote, is not law of the case
24 because it is dicta. The Ninth Circuit's held that there were triable issues of fact as to if the Defendants complied
with the Knock and Announce statute based on the disputes of fact over the announce element. Thus, the Ninth
Circuit's assumption that there was a knock could also be dicta as it was not necessary or essential to their holding.

II. DISCUSSION

“The law of the case doctrine requires a district court to follow the appellate court's resolution of an issue of law in all subsequent proceedings in the same case.” *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1186 (9th Cir. 2001). The appellate court must have decided the issue “explicitly or by necessary implication.” *United States v. Jingles*, 702 F.3d 494, 499 (9th Cir. 2012). When the appellate court makes an assumption for the purpose of resolving another issue, that assumption is not the law of the case. *See Lucas Automotive Engineering Inc. v. Bridgestone/Firestone Inc.*, 275 F.3d 762, 766–67 (9th Cir. 2001); *Continental Ins. Co. v. Federal Express Corp.*, 454 F.3d 951, 954 (9th Cir. 2006). The doctrine does not extend to issues the appellate court did not “consider and actually decide[.]” *Andrews Farms v. Calcot, Ltd.*, 693 F. Supp. 2d 1154, 1164 (E.D. Cal. 2010) (citing *Hegler v. Borg*, 50 F.3d 1472, 1475 (9th Cir.1995)).

The related rule of mandate requires a district court to “act on the mandate of an appellate court, without variance.” *United States v. Garcia-Beltran*, 443 F.3d 1126, 1130 (9th Cir. 2006). However, the rule of mandate allows a district court to “decide anything not foreclosed by the mandate.” *Stacy v. Colvin*, 825 F.3d 563, 568 (9th Cir. 2016) (citing *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012)). A district court is limited by the appellate court’s remand only “when the scope of the remand is clear.” *Hall*, 697 F.3d at 1067 (citing *Mendez–Gutierrez v. Gonzales*, 444 F.3d 1168, 1172 (9th Cir.2006)).

The Ninth Circuit has applied the law of the case doctrine to legal conclusions and to factual findings in certain situations. *See Pit River Home and Agricultural Coop. Ass’n v. United States*, 30 F.3d 1088, 1096 (9th Cir. 1994). The doctrine typically applies to factual findings when an evidentiary hearing or trial produced those findings, or when the court previously

1 reviewed and adopted the factual findings. *See, e.g., id.* at 1096–97; *Matthews v. NCAA*, 179 F.
2 Supp. 2d 1209, 1218 (E.D. Wash. 2001).

3 A district court does not make factual findings on summary judgment. *Rand v. Rowland*,
4 154 F.3d 952, 957 n. 4 (9th Cir. 1998) (citing *Epstein v. MCA, Inc.*, 126 F.3d 1235, 1253 n. 18
5 (9th Cir.1997)). The court makes findings of fact when it weighs the evidence, determines
6 credibility, or resolves disputed factual issues; all of which are inappropriate on summary
7 judgment. *See id.*; *Heiniger v. City of Phoenix*, 625 F.2d 842, 843 (9th Cir. 1980). The court’s
8 only summary judgment inquiry is whether the evidence presents a genuine issue of material fact
9 precluding judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250
10 (1986). For the same reasons, an appellate court’s role is not to make findings of fact or weigh
11 the evidence when reviewing a summary judgment order. *See, e.g., United States v. Childs*, 944
12 F.2d 491, 495 (9th Cir. 1991).

13 The Fourth Amendment and the “knock and announce” statute require that an officer
14 seeking to enter a house to execute a warrant must knock and announce their presence before
15 entering the premises. *See* 18 U.S.C. § 3109; *United States v. Granville*, 222 F.3d 1214, 1218
16 (9th Cir. 2000). This Court did not weigh evidence or make findings of fact when it granted
17 summary judgment to Defendants on Greiner’s Fourth Amendment and “knock and announce”
18 claim. And the Ninth Circuit did not make findings of fact in its de novo review of this Court’s
19 Order.

20 The Ninth Circuit disagreed with this Court’s conclusion that no triable issue of material
21 fact existed as to whether the Agents complied with the “knock and announce” statute because “a
22 jury could reasonably infer from Greiner’s testimony that the Agents did not ‘announce[]
23 themselves before forcing entry into [her] home.’” Dkt # 135 at 4–5. They analyzed the evidence
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1 of an announcement, and quickly dispensed of the knock element in a footnote. The Ninth
2 Circuit assumed that a knock occurred because of Greiner’s counsel’s “concession,” but that
3 assumption is not a finding of fact, and it was not necessary to reverse this Court’s determination
4 that no triable issue of fact existed as to the Defendants’ compliance with the “knock and
5 announce” statute. The Ninth Circuit did not actually decide whether a knock occurred and their
6 assumption that it did is not the law of the case and is not binding on this Court.

7 The Ninth Circuit mandated that this Court hold a trial to determine if the Defendants’
8 complied with the statute. The Ninth Circuit never instructed the Court to only conduct a trial on
9 the announcement element of the statute. The Court is complying with the spirit and terms of the
10 Ninth Circuit’s mandate by allowing the jury to make findings on the Defendants’ compliance
11 with the entire statute.

12 The Court does not ask a jury to make findings on the individual elements of a statute and
13 will not blind the jury as to part of the story. The parties will present the entire story to the jury
14 regarding whether the Defendants’ knocked and announced before entering Greiner’s home. The
15 jury will be asked to determine if the Defendants complied with the “knock and announce”
16 statute; they will not be asked about each individual element.

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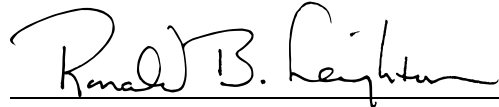
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1 **III. CONCLUSION**

2 Defendants' Motion to Apply the Law of the Case Doctrine and Mandate Rule is
3 DENIED.

4 IT IS SO ORDERED.

5 Dated this 7th day of November, 2019.

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8 Ronald B. Leighton
9 United States District Judge
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